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## THE STATE BAR'S ROLE AND ELIMINATION OF BIAS IN THE LEGAL PROFESSION

By Ernest Schall



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REQUIREMENT FOR ELIMINATION OF BIAS IN THE LEGAL PROFESSION BASED ON ANY OF, BUT NOT LIMITED TO, THE FOLLOWING CHARACTERISTICS: SEX, COLOR, RACE, RELIGION, ANCESTRY, NATIONAL ORIGIN, BLINDNESS OR OTHER PHYSICAL DISABILITY, AGE, AND SEXUAL ORIENTATION (SEE MCLE RULE 2.1.3). THE FOCUS WILL BE WHAT THE STATE OF CALIFORNIA IS DOING TO ELIMINATE SUCH BIAS.

First off, it is important to realize that the topic of elimination of bias in the legal profession is a much narrower topic than may be assumed. According to the guidelines issued by the State Bar, elimination of bias in the legal profession does not cover bias generally. An activity that focuses on bias among attorneys, or on bias found in the courtroom, counts for MCLE bias credit. Activities addressing societal bias, the ADA laws, diversity in the workplace, and how to handle a sexual harassment case do not count for MCLE bias credit.

Using this narrow definition, I was surprised how little about this subject was on the State Bar Web site. That Web site had a lot of information on diversity in the workplace but almost nothing on elimination of bias in the legal profession, except for dealing with the one hour MCLE requirement. More troubling, an analysis of the State Bar of California structure shows that it is unclear who has the task of eliminating such bias.

Reviewing the resources on Rules of Professional Conduct, I found only one rule that specifically applied. That was Rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice). That rule states that in the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit

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unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in two types of activities. One type is determining the conditions of employment (hiring, promoting, discharging, etc.). The other type is accepting or terminating representation of any client.

Although the language is slightly different, both MCLE Rule 2.1.3 and Rule 2-400 of Professional Conduct cover the same type of characteristics to be protected from bias or discrimination. On the other hand, there is a big difference between the scope of the two rules. According to the guidelines issued by the State Bar for MCLE Rule 2.1.3, that rule focuses generally on bias among attorneys and on bias found in the courtroom, but Rule 2-400 only prohibits discrimination in the conditions of employment or in accepting or terminating representation of a client. Also, Rule 2-400 only prohibits discrimination that is “unlawful.” That term (“unlawful”) is determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

According to Section (C) of Rule 2-400, the State Bar cannot initiate a disciplinary investigation or proceeding against a member under that rule unless some other tribunal of competent jurisdiction, not a disciplinary tribunal, has first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Even then, in order for discipline to be imposed under this rule, the finding of unlawfulness must be upheld and final after appeal, the time for fil-

ing an appeal must have expired, or the appeal must have been dismissed.

In other words, if bias in the legal profession doesn’t rise to the level of being unlawful under state or federal law, then there is nothing to prevent such bias under Rule 2-400.

Although there are other rules that apply, in addition to the Rules of Professional Conduct, such as the 2002 California Rules of Court, they don’t seem to limit the conduct of general lawyers.

Rule 989.2 (Nondiscrimination in court appointments) of the 2002 California Rules of Court states that it shall be the policy of each court to select attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court on the basis of merit. No court shall discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.

Section 1.6. of the 2002 California Rules of Court (Selection of members of court-related committees) states that a court that selects members to serve on court-related committees

should establish procedures ensuring that all qualified persons have equal access to selection regardless of gender, race, ethnicity, disability, sexual orientation, or age.

Note that the language of MCLE Rule 2.1.3, the Rules of Professional Conduct, and the 2003 California Rules of Court do not use the same language in discussing the protected classes. This causes an anomaly, in that the California Rules of Court seem

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## **LOOKING AT THE STRUCTURE OF THE STATE BAR OF CALIFORNIA, THE GOAL OF ELIMINATING BIAS IN THE LEGAL PROFESSION DOESN’T SEEM TO HAVE A HOME.**

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### QUESTIONS: ELIMINATION OF BIAS IN THE LEGAL PROFESSION



1. Activities addressing bias among attorneys count for MCLE elimination of bias in the legal profession credit.

**True False**

2. Activities addressing societal bias count for MCLE elimination of bias in the legal profession credit.

**True False**

3. Activities addressing the ADA laws count for MCLE elimination of bias in the legal profession credit.

**True False**

4. Activities addressing diversity in the workplace count for MCLE elimination of bias in the legal profession credit.

**True False**

5. Activities addressing how to handle a sexual harassment case count for MCLE elimination of bias in the legal profession credit.

**True False**

6. Activities addressing bias found in the courtroom count for MCLE elimination of bias in the legal profession credit.

**True False**

7. The State Bar of California has a wealth of information on their Web site on elimination of bias in the legal profession.

**True False**

8. The Rules of Professional Conduct prohibit any type of discrimination based upon race, national origin, sex, sexual orientation, religion, age or disability.

**True False**

9. It is against the Rules of Professional Conduct to unlawfully discriminate against someone because of their age in determining whether to accept a client.

**True False**

10. The term "unlawful discrimination" is explicitly defined within the Rules of Professional Conduct.

**True False**

11. On its own, the State Bar can initiate a disciplinary investigation under Rule 2-400, based solely on a complaint of discrimination.

**True False**

12. A disciplinary tribunal can be the tribunal of competent jurisdiction that determines if an act is an unlawful discrimination under Rule 2-400.

**True False**

13. An order for discipline can be imposed under Rule 2-400 as soon as a finding of unlawfulness has been made.

**True False**

14. The term "unlawful" used in a disciplinary proceeding can be broader than that under state or federal law.

**True False**

15. A court, in selecting attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court, shall not discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.

**True False**

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16. A court, in selecting members to serve on court-related committees, shall not discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.

**True False**

17. The various rules of the Court and the Bar, relating to bias, fail to use the same language in describing areas upon which selection cannot be based.

**True False**

18. The standing committee on sexual orientation and gender identity discrimination has, as its main task, eliminating bias in the legal profession.

**True False**

19. There is a special committee of the State Bar specifically addressing elimination of bias in the legal profession.

**True False**

20. A review of the State Bars section executive committees, special committees, boards, and commissions, and entities, finds that none of them seem to address the problem of elimination of bias in the legal profession.

**True False**

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to permit selection based upon religious beliefs, since religion is not mentioned in the rule, but the MCLE Rule 2.1.3 and the Rules of Professional Conduct do not permit selections based upon religious beliefs.

Looking at the structure of the State Bar of California, the goal of eliminating bias in the legal profession doesn't seem to have a home. Among the standing committees of the Bar, there are a few standing committees that sound promising, but none of them have the task of eliminating bias.

There are standing committees on ethnic minority relations, legal professionals with disabilities, sexual orientation and gender identity discrimination, and women in the law. Their tasks are listed on the bar Web site as being the same: increasing participation in the administration and governance of the State Bar's programs and activities of attorneys who have been under-represented, such as attorneys who are women, ethnic minorities, gay, lesbian, transgender or bisexual, attorneys with disabilities, and senior lawyers. Nothing is said in its description about eliminating bias. There is a big difference between under-representation of a protected group and elimination of bias against that group. The two goals may be related, but they are not the same things.

A review of the State Bar's section executive committees, special committees, boards, and commissions

shows that none of them seem to have as their goal addressing the problem of elimination of bias in the legal profession.

In dicta in a dissenting opinion of *Warden v. State Bar* (1999) 21 Cal.4th 628, 88 Cal.Rptr.2d 283; 982 P.2d 154, J. Kennard stated that "Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them." That may be true, but it is unclear whether mandatory instruction would be able to eliminate that bias all by itself.

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**THERE IS A BIG  
DIFFERENCE  
BETWEEN UNDER-  
REPRESENTATION  
OF A PROTECTED  
GROUP AND  
ELIMINATION OF  
BIAS AGAINST  
THAT GROUP.**